



California Fair Political Practices Commission

July 18, 1986

Ms. Sheila K. Vassey
Staff Counsel
State Water Resources
Control Board
P.O. Box 100
Sacramento, CA 95801

Re: Your Request for Advice
Our File No. A-86-201

Dear Ms. Vassey:

Thank you for your request for advice on behalf of Darlene E. Ruiz, a member of the State Water Resources Control Board, concerning her duties under the conflict of interest provisions of the Political Reform Act.^{1/}

QUESTION

Ms. Ruiz' spouse is the owner of a lobbying firm and derives income from clients that could be affected by decisions of the State Water Resources Control Board. His contractual agreement with his clients specifies that he will not appear before the Board in his clients' behalf. Further, he and Ms. Ruiz have a formal separate property agreement with which they have strictly complied and as a result have no community property. In light of these facts, may Ms. Ruiz participate in any governmental decision which may affect one or more of the clients of her husband's lobbying firm?

CONCLUSION

Under the specific facts presented, Ms. Ruiz may participate in any governmental decision which may affect one or more of the clients of her husband's lobbying firm.

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated.

ANALYSIS

Initially, we note that this advice is based on a highly unusual set of facts, and should not be considered applicable to any situation other than the one presented. The unique facts presented include a formal, written separate property agreement entered into by a state public official and her spouse. This agreement has been recorded, and we have received assurances that the public official and her spouse have strictly abided by this agreement. Furthermore, the public official's husband has arranged his business practices so that his business will not be affected by his wife's agency's actions. The husband is a lobbyist and has clients who could be significantly affected by his wife's agency. However, his contracts with those clients expressly provide that he will not represent those clients before his wife's agency or the regional agencies subject to the control of his wife's agency. Our analysis and conclusion emphasize the importance of these facts.

Darlene Ruiz is employed as a full-time member of the State Water Resources Control Board. Her husband is the sole owner of a lobbying firm. Two of his principal clients are Atlantic Richfield Company and the California Manufacturers Association. Ms. Ruiz' husband provides lobbying services on a contractual basis. The contracts provide that he will render services as a legislative advocate, but that he will not appear before either the State Water Resources Control Board or any of the nine Regional Water Quality Control Boards as a lobbyist on behalf of his clients. The State Water Resources Control Board plays an important role in regulating oil companies, including Atlantic Richfield.

Section 87100 prohibits a public official from making, participating in the making, or in any way attempting to use her official position to influence a governmental decision in which she knows or has reason to know she has a financial interest. An official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or a member of his or her immediate family, or on, among other interests:

1. Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more. Section 87103(a).

2. Any source of income ... aggregating two hundred fifty dollars or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made. Section 87103(c).

There is no question that Ms. Ruiz is a public official for the purposes of the Act and as such, will be involved in governmental decision-making. Section 82048. The issue is whether in fact she has an economic interest which may be affected by such a decision. It is complicated by the fact that Ms. Ruiz and her spouse have entered into a formal, written and recorded separate property agreement with which they have strictly complied. As a consequence, she has no community property interest in the income of her spouse or in his investments. Income received by each is placed into his or her individual account over which the other spouse has neither access, management nor control.

Taking these facts into consideration, we first look to whether Ms. Ruiz may have an "investment" in her husband's firm which could be the basis of a conflict of interest under Section 87103(a). Section 82034 defines an "investment" as an ownership interest in a business entity owned directly, indirectly, or beneficially by the public official, filer or member of his or her immediate family (emphasis added). According to Section 82029, "immediate family" means the public official's spouse and dependent children. Under those statutes, Ms. Ruiz does have an "investment" interest in her husband's lobbying firm, notwithstanding the fact that the lobbying firm is his separate property. This assumes that the business is worth one thousand dollars or more. As a result, we note that this investment may be the basis for a conflict of interest requiring Ms. Ruiz to refrain from participating in certain governmental decisions. Before we discuss whether this investment interest requires Ms. Ruiz to disqualify herself from any decisions, we should discuss the other economic interests which could create a conflict of interest for Ms. Ruiz.

The second economic interest which may give rise to a conflict of interest is the possibility that Ms. Ruiz may derive "income" from her husband's lobbying firm which would be a potentially disqualifying financial interest under Section 87103(c). For the purposes of the Act, "income" is defined in Section 82030(a) to include "the community interest in the income of a spouse." Ms. Ruiz' husband, as the sole owner of a lobbying firm, derives income from this business in excess of \$250 annually. Therefore, any community property interest which

Ms. Ruiz may have in her husband's income from the lobbying firm would be considered her income under Section 82030(a) and may constitute a potentially disqualifying interest under Section 87103(c).

However, as a result of her formal separate property agreement with her husband, Ms. Ruiz has no community property interest in her husband's income. Accordingly, her husband's income cannot be the basis for a conflict of interest under Sections 87100 and 87103.

"Income" is also defined in Section 82030 as "a pro rata share of any income of any business entity or trust in which the individual or spouse owns directly, indirectly or beneficially, a 10% interest or greater." Accordingly, if the official's spouse owns a 10% or greater interest in a business entity, the clients of the business entity are considered sources of income to the official based on her community property interest in her spouse's pro rata share of the gross receipts from those clients. While this provision would generally make the clients of Ms. Ruiz' husband's lobbying firm sources of income to Ms. Ruiz, the 10% pass-through rule does not apply to these facts due to the separate property agreement between Ms. Ruiz and her spouse. Therefore, Ms. Ruiz has no interest in the income from clients of her husband's lobbying firm.

Finally, since the financial interest of a member of Ms. Ruiz' immediate family is involved, it is necessary to ascertain whether any decision in which Ms. Ruiz may participate could have a reasonably foreseeable material financial effect on that family member. This is because the disqualification provisions of Section 87103 also apply if a decision would have a reasonably foreseeable material financial effect, distinguishable from the effect on the public generally, on the public official or a member of his or her immediate family. However, we have interpreted this language in Section 87103 narrowly, focusing on the personal finances of the public official and her family rather than their business dealings. This distinction is supported by 2 Cal. Adm. Code Section 18702.1(a)(4). That regulation requires disqualification if it is reasonably foreseeable "that the personal expenses, income, assets, or liabilities of the official or his or her immediate family be increased or decreased by at least \$250." Applying that limited standard to these facts, we do not foresee any financial impact on the personal income of Ms. Ruiz' husband as a result of these governmental decisions.

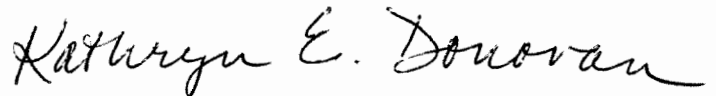
Ms. Sheila K. Vassey
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Having considered the economic interests which could require disqualification and having concluded that Ms. Ruiz does have a potentially disqualifying investment interest in her husband's lobbying firm, the analysis now turns to whether any decision made by Ms. Ruiz will have a reasonably foreseeable material financial effect on her husband's lobbying firm.

There is no all-inclusive test for foreseeability; the question of whether financial consequences upon a business entity are reasonably foreseeable at the time of a governmental decision must always depend on the facts of each particular case. In the Matter of Tom Thorne, 1 FPPC 198 (December 4, 1975; No. 75-089). In our opinion, no material financial effect on Ms. Ruiz' husband's lobbying firm can be foreseen given the facts under analysis here. Ms. Ruiz' husband has specifically provided in the contracts with his clients that he will not lobby the State Board or any of the nine regional boards. As a result, it is not reasonably foreseeable that the decisions of the State Board will have a material financial effect on her husband's lobbying firm. Therefore, Ms. Ruiz may participate in governmental decisions affecting her husband's clients as those decisions will not have a reasonably foreseeable material financial effect on her husband's lobbying firm.

If you have any questions regarding this letter, please contact me at (916) 322-5901.

Sincerely,



Kathryn E. Donovan
Counsel
Legal Division

KED:DL:km

Memorandum

F P P C

To : Fair Political Practices Commission
428 J Street, Suite 800
Sacramento, CA 95814

JUN 18 2 42 PM '86

Date : JUN 17 1986



Sheila K. Vassey
Staff Counsel

From : **STATE WATER RESOURCES CONTROL BOARD**

Subject: REQUEST FOR FORMAL WRITTEN ADVICE PURSUANT TO GOVERNMENT CODE SECTION 83114(b)

As a Staff Counsel for the State Water Resources Control Board (State Board), I would like to request formal written advice from the Commission, pursuant to Government Code Section 83114(b) and Section 18329 of Title 2 of the California Administrative Code, on behalf of Ms. Darlene Ruiz. Ms. Ruiz is a member of the State Board, and her mailing address is:

State Water Resources Control Board
P. O. Box 100
Sacramento, CA 95801

She has authorized me to make this request.

The specific issue for which we would like formal written advice is:

Are clients of the lobbying firm owned by Ms. Ruiz' husband sources of income to her, despite the existence of a written separate property agreement?

The facts which we believe are material to a resolution of the above question are as follows.

Ms. Ruiz is employed full-time as a State Board member. Her husband is the sole owner of a lobbying firm. Two of his principal clients are Atlantic Richfield Company and the California Manufacturers Association. Ms. Ruiz' husband provides lobbying services on a contractual basis. The contracts provide that he will render services as a legislative advocate, but that he will not appear before either the State Board or any of the nine California Regional Water Quality Control Boards (Regional Boards) as a lobbyist on behalf of his clients. Ms. Ruiz and her spouse have a formal, written and recorded, separate property agreement; consequently, she has no community property interest in the income of her spouse.

The State Board is presently considering the possibility of developing a program to regulate above-ground tanks and pipelines as part of a groundwater protection strategy. Ms. Ruiz would like to take an active role in developing such a program. Should one be developed, it is possible that the program could have a financial effect on clients of the lobbying firm owned by Ms. Ruiz' husband. The key issue, therefore, is whether these clients are considered sources of income to Ms. Ruiz, for purposes of the Political Reform Act, Government Code §§81000 et seq., despite the existence of the separate property agreement.

Options which the State Board could consider in developing a regulatory program for above-ground tanks and pipelines are: (1) proposing legislation which would establish a specific statutory framework for regulation of these structures; or (2) regulating these facilities under the existing authority of the State and Regional Boards to regulate waste discharges which could affect water quality. If the latter approach is taken, the State Board can select from several possible administrative tools authorized under existing law.

The following discussion briefly reviews the regulatory authority of the State and Regional Boards. The State is divided into nine regions, based upon hydrologic basins, each with a Regional Board. The Regional Boards are authorized under the Porter-Cologne Water Quality Act (Porter-Cologne Act), Water Code §§13000 et seq., to take a variety of actions relating to water quality control within their respective regions. These include the adoption of regional water quality control plans (basin plans), the adoption of waste discharge requirements for individual waste discharges, the adoption of enforcement orders, for example, cleanup and abatement orders and cease and desist orders, and the imposition of administrative civil liability.

The State Board is authorized under the Porter-Cologne Act to review, either on its own motion or in response to a petition by an aggrieved person, specified actions or inactions of the Regional Boards. The State Board is also authorized to adopt state policy for water quality control with which all of the Regional Boards must comply. The State Board exercises an oversight role with respect to the Regional Boards and, in this regard, has adopted a Policy and Procedures Manual, which provides guidance to the Regional Boards on the exercise of their regulatory responsibilities. In addition, the State Board has adopted regulations, applicable to both the State and Regional Boards, implementing various regulatory programs. As an example, the State Board has adopted detailed regulations in Subchapter 15, Chapter 3 of Title 23 of the California Administrative Code, governing waste disposal to land. If the State Board decides to develop a regulatory program for above-ground tanks, the State Board has at least four possible options. The State Board could adopt a specific state policy for water quality control governing above-ground tanks and pipelines. Once adopted, all of the Regional Boards would be required to comply with the policy in the regulation of waste discharges from

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such facilities. The policy could direct the Regional Board to regulate these facilities under waste discharge requirements or, alternatively, could authorize the Regional Board to waive regulation of these facilities provided that the owners or operators complied with certain "best management practices" specified in the policy.

Secondly, the State Board could adopt regulations governing above-ground tanks and pipelines. The regulations could achieve the same goals as adoption of a state policy for water quality control, discussed above.

Thirdly, the State Board, on its own motion, in the exercise of its authority to review the action or failure to act of a Regional Board, could undertake to directly regulate above-ground tanks and pipelines. In reviewing the actions or failure to act of a Regional Board, the State Board is vested with all of the powers of the Regional Board.

The State Board could also revise the Policy and Procedures Manual to provide guidance to the Regional Board on the regulation of above-ground tanks and pipelines. While the Regional Boards are not absolutely compelled to comply with the Manual; the Manual nevertheless reflects the strong policy of the State Board on appropriate regulation.

Please feel free to contact me at 322-0215 or ATSS 492-0215 if you have any questions regarding this memorandum.

cc: Darlene E. Ruiz



California Fair Political Practices Commission

June 19, 1986

Sheila K. Vassey
Staff Counsel
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95801

Re: 86-201

Dear Ms. Vassey:

Your letter requesting advice under the Political Reform Act has been received on June 18, 1986 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact me directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or unless more information is needed to answer your request, you should expect a response within 21 working days.

Very truly yours,

Kathryn E. Donovan
Counsel
Legal Division

KED:plh
cc: Darlene Ruiz